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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 947.

M. HAMPTON MAGRUDER, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MARYLAND,

Petitioner,

vs.

FREDERICK M. SUPPLEE AND ELIZABETH G. SUPPLEE, HIS WIFE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion (R. 3-12) of the District Court (also treated as a finding of fact) is reported in 36 F. Supp. 722.

The per curiam opinion (R. 21) of the Circuit Court of Appeals is reported in 123 F. (2d) 399.

QUESTION PRESENTED.

Whether a purchaser of real estate in Baltimore City who has paid current City and State taxes thereon, assessed prior thereto to the seller, and adjustment of which

has been made to the date of sale, may, in his income-tax return, deduct from gross income that part of such taxes representing the time he was the actual owner of the property.

STATUTES INVOLVED.

Revenue Act of 1936:

"Sec. 23: Deductions from gross income:

"In computing net income there shall be allowed as deductions:

(a) Expenses. * * *

(b) Interest * * *

(c) Taxes Generally—*Taxes paid or accrued within the taxable year*, except * * *" (Exceptions not material here).

STATEMENT.

This is a civil suit by Frederick M. Supplee and Elizabeth G. Supplee, his wife, respondents, against M. Hampton Magruder, Collector of Internal Revenue for the District of Maryland, petitioner, to recover $883.51 with interest, by reason of alleged overpayment of income taxes for the taxable years 1936 and 1937.

FACTS.

In November, 1938, the Collector assessed the respondents the following deficiency income taxes for the calendar years 1936 and 1937:

1936		1937	
Tax	$3,399.71	Tax	$646.24
Interest	327.44	Interest	23.46
Total	$3,737.15	Total	$669.70

These amounts were paid by the respondents on November 21, 1938, under protest. Later, and prior to the filing

of an amended complaint, appropriate claims for refund of the parts thereof hereafter mentioned were filed with and denied by the Commissioner of Internal Revenue.

Included in the 1936 deficiency assessment is $200.68, and interest, $19.33, which represents the amounts the respondents were compelled to pay the Collector by reason of the disallowance, in computing net income, of deductions for the respondents' proportionate share of the 1936 City and State taxes paid by them on certain parcels of real estate acquired during that year, adjustment of said real estate taxes in this and the following instance, as between buyer and seller, having been made to the dates of sale. Respondents had taken such deductions in their 1936 income tax return.

Similarly, included in the 1937 deficiency assessment is $646.24 and interest, $23.46, representing the amounts the respondents were compelled to pay by reason of the disallowance of deductions for their proportionate share of 1937 City and State taxes paid by them on certain other parcels of real estate bought by them during that year. They had likewise taken these deductions in their 1937 income tax return.

The respondents only claimed deductions for the proportionate parts of the State and City taxes for 1936 and 1937 which they had paid, and which covered the periods of time they were the actual owners of the properties (R. 20), and the sellers likewise, in their income tax returns, claimed deductions on a similar basis (R. 16-17). The Commissioner disallowed these deductions by the respondents on the ground that those taxes had accrued on the properties prior to their acquisition by the respondents, and the payment of any part thereof by them constituted but a part of the purchase price, and was not the payment

of "taxes" within the meaning of section 23 (c) of the Revenue Act of 1936, under which such deductions were claimed as "taxes paid" during the taxable year.

SUMMARY OF ARGUMENT.

1. The words "taxes paid", contained in Section 23 (c) of the Revenue Act of 1936, must be given their ordinary meaning, i. e., construed to mean *all taxes paid*, and the rights of the income taxpayer thereunder may not be narrowed down by writing exceptions into the Section by construction.

2. The Federal Income Tax Act is to be given a uniform construction of nation-wide application except insofar as Congress has made it dependent on State Law, and Congress, in this instance, has not so provided. By giving the words "taxes paid" in Section 23 (c) their ordinary meaning as contended for by the respondents, all the confusion of which the petitioner complains, disappears, simple uniformity throughout the United States is obtained, and the maze of State and Municipal statutes with which both the petitioner and the taxpayer has heretofore so often had to deal, is eliminated.

ARGUMENT.

ANALYSIS OF DECISIONS.

Before setting out our conclusions on the question presented, we believe it well to analyze chronologically the decisions which heretofore have been rendered, having a bearing thereon.

First. In Falk Corporation v. Commissioner (C. C. A. 7, July 6, 1932) 60 F. (2nd) 204, the Falk Company turned over a large part of its assets to the newly organized Falk Corporation. As a consideration therefor, the Falk Corporation issued to the Falk Company its entire authorized

capital stock and expressly agreed to assume all liabilities of the Falk Company including state income taxes. The Falk Corporation later paid state income taxes assessed against the Falk Company, liability for which the Falk Company did not deny, and claimed deduction therefor in its Federal income tax return as "taxes paid * * * within the taxable year." *Section 234(a) (3), R.A. 1926.* The Court disallowed the deduction, saying (p. 206) in part:

> "It is admitted that the money paid by petitioner to the state of Wisconsin was a part of the consideration for the assets received by it from Falk Company. It was made so by virtue of a contract entered into between Falk Company and petitioner. The amount paid, therefore, was a capital expenditure and of course cannot be deducted from petitioner's income in the determination of its income tax unless there is legislative sanction for doing so."

That case is clearly different from the case at bar in that there, *by express agreement*, the payment of the state income taxes by the corporation was part of the consideration to be paid by the Falk Corporation for the assets which it received.

There is no other way that one could become liable for another's income tax than by voluntary contract, whereas, since a lien exists on real estate for the payment of the taxes thereon, and the State, County and City governments look primarily, if not altogether, to the property for payment, when that lien is enforced the present owner is the first to suffer, even though he did not own the property during the time covered by the tax. Such payment is involuntary. In fact, the present owner, through the enforcement of the lien against his property for taxes accruing before his ownership thereof, may, in many instances be unable to recoup his losses from his predecessor in title,

whatever the relationship between them may be. Hence he is the actual person liable for the taxes regardless of to whom the property was assessed.

This case is also different from the case at bar in that all of the state income taxes paid by the Falk Corporation had fully and actually accrued in the ordinary sense, i. e., by day to day accrual. Real estate taxes, with their peculiar system of assessment, dates of incidence, finality, lien dates, delinquent dates, etc., are assessed by the year, and are payable in advance. During that time title to the property may change many times with attendant equities in the various owners, while state income taxes, involve no such equities.

Second. In Helvering v. Missouri State L. Ins. Co. (C. C. A. 8—July 24, 1934), 78 F. (2d) 778, the Court (p. 781) said:

> "Accrued taxes and assessments upon lands acquired by the taxpayer and paid by it subsequent to acquisition we think were not taxes 'paid during the taxable year exclusively upon or with respect to real estate owned by the company' within the meaning of the Act. Revenue Act 1928, sec. 203 (a) (6), 26 U. S. C. A. section 2203 (a) (6). These taxes were assessed and had become liens upon the lands while in other ownership. The taxpayer took them subject to the lien of the taxes. The liens were in a sense a part of the capital expenditures for the acquisition of the lands, and hence they did not, in a proper sense, pertain to the investment expenditures of the company to be used in determining net income. These taxes stand on an entirely different basis than taxes on real estate accruing after acquisition."

This opinion does not state whether the real estate taxes in question were for periods of time which had fully expired prior to the Federal income taxpayer's acquisition of

the lands, or whether any part of such real estate taxes, assuming a day to day accrual thereof, accrued after such acquisition of the land. As stated by the District Court in the case at bar, we think there is a substantial difference between those instances.

It is also to be noted that in the above case the taxpayer claimed deduction under section 203 (a) (6) of the Revenue Act of 1928, as taxes and other expenses "paid during the taxable year exclusively upon or with respect to the real estate owned by the company", which section relates exclusively to "Net Income of Life Insurance Companies", and not under section 23 (c) of that Act, which latter section is the same as section 23 (c) of the Revenue Act of 1936, here involved.

Third. In Merchants Bank Building Co. v. Helvering (C. C. A. 8, June 16, 1936), 84 F. (2d) 478, the Merchants National Bank in March, 1929, transferred its real estate to Merchants Bank Building, receiving in exchange therefor all of the capital stock of the Merchants Bank Building. At the time of transfer there were assessed and unpaid taxes against the property for the year 1928. Deduction for the payment of such taxes was disallowed the transferee in computing net income for the year 1929, said taxes being regarded as a part of the purchase price.

It is to be noted however that the real estate taxes involved in that case, had, in every sense, fully accrued prior to the transfer of the property and there was no adjustment of the current year's real estate taxes to the date of purchase as in the case at bar.

Fourth. Parrott Estate Company v. McLaughlin, (C. C. A. 9—March 29, 1937), 89 F. (2d) 188. In this case the Parrott Estate Company was a corporation formed by the heirs, legatees, devisees and distributees of Emily Parrott,

deceased, who had assigned their interests in that estate to the Company in return for stock therein. In 1929 the Company was disallowed a deduction in income taxes for inheritance taxes paid to California, and sued to recover the same. The Court found against the Company for four reasons, only the last of which is material in the case at bar. That reason (fourth) was that section 234 of the Revenue Act of 1926 which permitted deduction for taxes paid, did not apply in that instance, for two reasons, one of which was that "it must be assumed (there being no allegations in the pleadings or evidence in the case with relation thereto) that the tax was paid as a part of the purchase price for the property received by it from the legatees and devisees".

That case was different from the case at bar in that in the present case there was a finding that fixed purchase prices were agreed on, with adjustment of taxes to the dates of sale referred to as separate therefrom. In other words, the agreement in the case at bar was that the purchasers would pay the fixed prices for the properties and the taxes from the dates of purchase onward.

Fifth. In Walsh-McGuire Co. v. Commissioner (C. C. A. 6—June 7, 1938), 97 F. (2d) 983, the taxpayer, a corporation, was organized on April 16, 1931, on which date it acquired real estate in Cleveland. Its books were kept on the accrual basis and the item in controversy was a real estate tax for the first half of 1931 (January 1, to June 30), paid February 2, 1932. Deduction of this tax was claimed, presumably in the 1931 return, under Section 23, Revenue Act of 1928, C. 852, 45 Stat. 791, 799, 26 U. S. C. A. Section 23.

Taxes for 1931, under Section 5671, General Code of Ohio, became a lien on April 12, 1931, but the amount of

the 1931 tax assessment was not determined until December 7, 1931. The taxpayer urged that as the tax was not fixed and determinable on April 12, 1931, nor for a long time thereafter the liability did not arise until after its acquisition of the property, and that the amount paid in taxes was deductible because the payment was made in liquidation of its own liability.

The Court said:

"Whether such liability (of petitioner) in fact existed depends upon Ohio law * * *.

"The Ohio decisions construing the statutes which govern this question hold that the amount of the assessment when ascertained relates back to the date of incidence, and hence in legal contemplation both the liability and the amount of tax are determined here as of April 12, 1931. * * * Section 5671, General Code of Ohio, does not require that all legal steps prerequisite to the ascertainment of the amount of the tax be taken before the second Monday in April. The legislature contemplated the computing of amounts after the date of incidence and the assessment, when ascertained, then relates back to the time at which the tax becomes a lien * * *.

"Each person holding the land is required to pay the tax assessed thereon each year. Section 5681, General Code of Ohio. While the taxes are levied and assessed upon the real estate, they are also a personal obligation of the owner of such property. * * * These taxes, then, which accrued on April 12, 1931, prior to the organization of the petitioner's corporation, were the obligations of petitioner's predecessor in title. The payment was made in order to lift the incumbrance from the land, and was a capital expenditure being a part of the cost of acquiring the land * * *.

"* * * The statute authorizes a deduction only by the taxpayer whose property or interests give rise to the deduction * * *. As these taxes were paid to dis-

charge the obligation of petitioner's predecessor in title they were not deductible.

"* * * It is the owner of property who is liable for the tax * * *. Here the vendee had no interest in the property on April 12, 1931."

Here, deduction was claimed under the word "accrued" while in the case at bar the word to be construed is not "accrued", but "paid", within the taxable year. This line of cases is clearly distinguished in Commissioner v. Coward, post.

Sixth. In Lifson, et al., v. Commissioner (C. C. A. 8—August 18, 1938), 98 F. (2d) 508, Lincoln Co., in 1932, owned a building which, in May, 1932, it mortgaged. The mortgage was foreclosed on October 7, 1932, and the building purchased at the foreclosure sale by the mortgagee. The law allowed one year thereafter within which the mortgagor could redeem the property. On August 16, 1933, the taxpayer, Lifson, purchased the Sheriff's certificate of foreclosure sale, from the mortgagee, thereby acquiring the property and took possession on October 16, 1933. The 1933 real estate taxes on the property became a lien on May 1, 1933, although the amount of the taxes had not at that time been ascertained or levied and they were not due and payable until January, 1934.

The Revenue Act of 1934, C. 277, 23 (c), 48 Stat. 680, 688, 26 U. S. C. A. Section 23 (c), provided that in computing net income there should be allowed as a deduction "Taxes paid or accrued within the taxable year" (with certain exceptions not here material). The petitioners contended as follows;

"(1) That the taxes did not 'accrue' on May 1, 1933, because all of the events which fixed the amount of the taxes and which determined the liability of the taxpayer to pay them had not then occurred, and be-

cause there was no personal obligation imposed by the laws of Minnesota upon owners of real estate with respect to real estate taxes—the tax being made a charge against, and lien upon, the land only; (2) that, since Sophie Lifson and her husband made their joint return upon a cash basis, they were entitled to a deduction for 'taxes paid * * * within the taxable year', regardless of when such taxes accrued or become a lien; and (3) that if the doctrine of relation is to be invoked to make the 1933 taxes a lien as of May 1, 1933, the same doctrine should be invoked to make Sophie Lifson the owner of the real estate as of May, 1932, when the mortgage upon which her title is based was executed."

The Court said:

"That Sophie Lifson acquired the Minnesota Building after May 1, 1933, and that at the time she acquired it the taxes for 1933 were, by State statute, a charge against and a lien upon it, cannot be controverted. She certainly had no interest in this real estate until August 16, 1933. The liability of the real estate for the taxes to be levied in 1933 and the lien for those taxes had then accrued.

"(2) When one purchases land which is subject to a lien for taxes, the subsequent payment of those taxes by the purchaser does not constitute an allowable deduction from gross income, for the reason that the taxes accrued while the land was in other ownership and the payment of them is merely a payment of a part of the cost of acquiring the property.

"(4, 5) The fact that the amount of the taxes here involved had not been definitely ascertained at the time the lien attached does not alter the situation * * *. There is no merit in the contention that real estate taxes do not 'accrue' unless they become a personal obligation of the owner of the land. They accrue in Minnesota when they become a charge against and a lien upon the land taxed."

This decision comes nearer to the case at bar than those previously mentioned but, even so, there are differences between them. In the Sheriff's foreclosure sale, the property was undoubtedly sold for a definite price, *and accrued taxes.* In other words, by express agreement, the purchaser agreed to pay the same, and had to do so, in order to obtain the title from the Sheriff. There was no adjustment to the date of sale between the parties as in the case at bar. Neither is there anything to show that a deduction for said taxes was not taken by the prior owner in his income tax return.

That there may be a distinction between cases where buyer and seller, by agreement, prorate the property tax, and cases where there is no such agreement, was recognized by the Board of Tax Appeals in this case when (36 B. T. A., p. 594) it used the following language:

> "Since by state law the charge is fixed as of May 1, although not accurately calculated till later, a buyer after May 1 would take it with knowledge of the tax and would negotiate his price accordingly, either to exclude or to include the tax, or perhaps to prorate it. Cf. State v. North-Western Telephone Exchange Co., 80 Minn. 17; 80 N. W. 1090. *Buying the sheriff's certificate, petitioner had no such choice. She bought the certificate with the burden of the accrued tax attached, and the cost of this certificate included the accrued tax.*" (Emphasis added.)

In other words, *the purchaser expressly agreed to pay the tax as a part of the cost of the property.* There was no such agreement in the case at bar.

Seventh. In Commissioner v. Plestcheeff (C. C. A. 9—Nov. 18, 1938), the facts were these:

Husband and wife made a joint tax return for 1932. On April 5, 1931, the wife's father died, by the terms of whose

will, real estate in Washington was devised to the wife. During 1932 the wife paid real estate taxes on the property so devised to her (apparently for the year 1931) and claimed a deduction accordingly on a cash basis. The Commissioner contended that liability for real estate taxes in the State of Washington was fixed as of March 1st, even though the amount of the tax was not ascertainable on that date, and, as the testator was then the living owner of the property, the payment of said taxes by his daughter after the property had, by devise, vested in her, did not entitle her to a deduction therefor.

The taxpayer contended that under the State statutes, as construed by its Courts, the assessed taxes did not become perfected liens until in October when levies were made.

The Court found that the lien would ordinarily have attached on March 1st, as contended by the Commissioner, but that in that case the relationship between testator and devisee was that of grantor and grantee within a statute (Remington's Revised Statutes of Washington, Sec. 11265) which expressly provided that "as between a grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year", on which date the taxpayer was the owner of the property; that hence the deduction should be allowed.

In deciding the case as it did, all the Court had to find was that the taxpayer was a "grantee" within the meaning of the special statute. Hence all other comments by the Court were mere obiter dicta.

Eighth. In Commissioner v. Coward (C. C. A. 3, February 23, 1940) 110 F. (2d) 725, the facts were these: In 1933 two parcels of improved income producing real estate

were owned by one X, one of which was acquired (presumably by purchase) by Coward on October 16, 1933, and the other on January 8, 1934. With relation to these two properties Coward paid real estate taxes for the year 1934 promptly as they, in installments, became payable, on February 1 (the amount being estimated with reference to the taxes for the previous year), May 1, (likewise estimated), August 1, and November 1, 1934, (adjusted to the estimates so as to total the by then determined amount of the 1934 tax). Had such payments not been made a lien would have attached therefor on December 1, 1934.

In her income tax return for the year 1934, the taxpayer claimed deductions from gross income for "Taxes paid * * * within the taxable year", under 26 U. S. C. A. Int. Rev. Code, 23 (c), which deductions were disallowed. The Commissioner contended that under the law of New Jersey all property is "assessed to the owner thereof with reference to the amount" then owned, on October 1st of each year, and that said real estate taxes accrued on that date (1933), when the taxpayer's predecessor in title owned the property; that therefore, liability for said taxes having become fixed as of that date, their subsequent payment by her converted them from taxes in the ordinary sense, into a capital expenditure, or part of the purchase price paid for the properties.

The Court found the following further facts: On January 10, 1934, the list of assessments which had been in the course of preparation since the first of October previous, was filed with the county board of taxation. Thereupon the board considered the revision of assessments and the amount of revenue to be raised during the current year (1934) for school, state, and local purposes. It fixed the local tax rate on March 10, 1934, and by April 1, 1934, a revised and corrected duplicate list of assessments certi-

fied as a true (and public) record of the taxes assessed was delivered to the collector.

After stating these facts, the Court, in part, said:

"From this welter of chronology, the Commissioner deduces that respondent, who keeps her books on the cash basis, is not entitled to deduct from her gross income for 1934, the real estate taxes paid by her in 1934. As he reasons, the sums paid were not taxes at all, but, rather part of the cost of the two parcels. *The argument is founded on precedent rather than principle*, and proceeds syllogistically as follows. Major premise: One who purchases real estate upon which local taxes have accrued may not deduct the latter payment of those taxes as 'taxes paid'.

Minor Premise: New Jersey real estate taxes had already accrued (at the date of assessment, October 1, 1933) on respondent's properties by the time she acquired them (October 16, 1933, January 8, 1934).

Conclusion: Respondent is not entitled to her deduction.

"The Board denies the minor premise and hence reaches an opposite conclusion, yet in doing so it does not look behind the misleading terminology of accrual employed in both premises. *As a consequence all concerned succumb to the influence of a line of cases which, we think, are completely beside the point. These have to do with the interpretation of the word 'accrued'.* That interpretation, as is expressly provided by statute, 26 U. S. C. A. Int. Rev. Code, sec. 48, lies in the field of accountancy on the accrual basis. The decisions are accordingly directed to the particular point of time when accounts payable (including taxes) may be listed on the taxpayer's books offsetting accounts receivable so as to fairly reflect the taxpayer's net income. See United States v. Anderson, 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347; 3 Paul and Mertens, Law of Federal Income Taxation, 23, 33. *Here, on the other hand, the word under construction is 'taxes' not 'accrued'.* We must determine whether a

given payment is a forced contribution to the expense of Government, or whether it is something else—a voluntary capital expenditure, for example. Its solution must lie in a close analysis of the transaction of payment. It cannot, in our judgment, be solved by any rule of thumb that a property owner's payment is not one of a tax on his property because a prior owner (on the accrual basis) might have been permitted to accrue it. For that permission to accrue it may depend on technical exigencies of accounting utterly foreign to the later owner's economic position in actually making the payment. That being so, our decision may be neither framed within the Commissioner's syllogism, nor guided by the accrual basis cases." (Emphasis added.)

After a review of the cases, the Court found that they suggested only two types of transactions where real estate "taxes" were not "taxes" within the meaning of the statutes, namely, (1), where property is sold and the buyer promises the seller to pay certain taxes on the property, and (2) where a lien for taxes had attached to the property prior to purchase by the taxpayer.

Without commenting on the decisions so holding, the Court said:

"Where, on the other hand, the tax payment falls into neither of these two categories—where it neither discharges (by contract, express or implied) the personal liability of another nor what was originally a tax lien on another's property—the deduction has been permitted."

In the case at bar respondents did not, by contract, either express or implied, agree to assume the seller's liability for the real estate taxes, but on the contrary, the very fact of the adjustment to the date of sale shows that the parties considered liability for such taxes to accrue from day to

day, parallel with actual ownership of the property, and the seller actually paid his portion thereof.

Again the Court in the Coward case said:

"Respondent's two parcels were, in theory, already 'liable' for the 1934 taxes when she purchased them. That is to say, nothing which occurred after the assessment of October 1, 1933, could alter the fact that the land itself must ultimately yield those taxes either directly through the eventual foreclosure of a tax lien, or indirectly through the medium of its then or subsequent owner's pocketbook. If for instance, the land assumed a tax exempt status on October 2, 1933, *it would, nevertheless, bear its full share of 1934 tax.* The presence of this liability in rem may well efford a basis for 'accruing' the tax in the accounting sense. But does its pre-existence deprive the purchaser who later discharges it of his income tax deduction?

(1) We think not. A New Jersey statute provides that in the absence of an express agreement to the contrary the buyer of real estate may hold the seller liable for such proportion of the current year's taxes as the time between January 1 and the date of the deed bears to the full calendar year, * * * *This statute does not affect the lien for unpaid taxes*—the crystallization of the land's liability in rem. So the fact that the property has been assessed prior to sale, does not in the eyes of the New Jersey Legislature mean that the tax resulting from that assessment is to be borne by the seller. *It is always borne by the land in the first instance. But as between buyer and seller it is apportioned on the basis of the calendar year. In other words, it is considered fair that the owner of land in any given year shall be called upon to contribute to the year's revenues only a sum commensurate with the length of the time the land has been held in that year*—except, of course, in the rare case of the prior owner's insolvency. *Such a contribution is, in our judgment a tax in every sense of the word.* * * * We may say that any other conclusion tends to work a

hardship on the taxpayer hardly contemplated by the broad language of the statute. *In this class of cases too great an insistence upon assessment—or, indeed, upon the lien when it relates back to the time of assessment, will often lead to puzzling anomalies.* If all the properties in one state were to change hands immediately after assessment, taxes levied on that assessment would, presumably, be paid by the new owners. The taxes so collected would be used by the state to defray the expenses of the government. Yet should none of the inhabitants of that state be permitted a federal income tax deduction for 'taxes paid'?" (Emphasis added.)

The Court accordingly held that none of the decisions relied on by the Commissioner applied and that the deduction should be allowed.

Ninth., In Commissioner v. Rust's Estate, et al. (C. C. A. 4—December 18, 1940), 116 F. (2d) 636, the facts were these:

On July 1, 1935, and for a number of years prior thereto a parcel of real estate in Washington, D. C., stood on the tax rolls in the name of the decedent's predecessor in title: On or before that date, under the District statutes taxes were assessed against the property for the fiscal year (July 1, 1935—June 30, 1936) then beginning. On July 19, 1935, the tax rate was fixed by the Commissioner and the amount determined, which was payable in two equal installments, in September, 1935, and March, 1936, respectively. On September 17, 1935, the property was purchased by the decedent at a mortgage foreclosure sale. Under the terms of the contract of sale the taxes for the current fiscal year, none of which had been paid, were adjusted to the date of sale and the taxpayer was credited with $3,142.10 representing the portion of the taxes allocable to the period be-

tween July 1 and September 17, 1935. The taxpayer paid the first installment of the taxes, with which he had been credited ($3,142.10), on September 28, 1935, and the second installment on March 31, 1936. Only the second installment was involved in that case, and was claimed as a deduction for taxes paid in 1936. The taxpayer kept his books on a cash basis. The deduction was disallowed by the Commissioner and allowed by the Board of Tax Appeals.

Under the decisions in the District of Columbia the assessment of real estate taxes does not create a personal liability, but only a charge upon the land, nor did any tax lien attach to the land by reason of the assessment. No lien arises prior to the occurrence of a delinquency.

There, the Court, in part, said:

> "Whether or not the deduction could lawfully be taken by the seller, or by the buyer, or partly by one or partly by the other, are questions which should be answered by ascertaining upon whom rests the obligation under the state law to pay the taxes, *having in mind the practicalities of the situation.* Taxes upon real estate constitute an ever recurring burden; and when, as in this case, the property is held as an investment, they are perforce treated as a current expense to be offset against current income. The provision of the agreement of sale that the taxes should be adjusted to the date of sale was therefore natural and proper, since it allotted to each party a part of the burden proportionate to the period during which he possessed the property and enjoyed the income. Such an arrangement between buyer and seller is typical, *and it would be in accord with the facts even if prior to the sale the tax has not only been assessed but has given rise to a lien.* The apportionment of the tax was clearly correct in the transaction under discussion, since no part of the second installment of the tax could be fairly allotted to the seller and no part of it was collectible by

the District during his period of ownership. The burden of paying this installment was an obligation which passed to the taxpayer with the ownership, in much the same fashion that the benefit of certain covenants is held to run with the land in the law of property; and the burden of the tax rested upon the taxpayer in a very real sense, for a delinquency would have been followed by a forced sale by the tax authority.

"The opposing theory advanced by the Commissioner is that in the case of a sale of property, a tax already assessed for the current year cannot be treated by the buyer as an item of current disbursement to be balanced against current income, but becomes a capital item which is added to the purchase price if previously paid by the seller, or subtracted from the purchase price if unpaid at the time of the sale; and, therefore, the tax is not a burden upon the buyer even if he subsequently pays it, because he has already been compensated by the seller. *But this theory is not in accord with the actualities of the ordinary case. The whole tax is not added to or subtracted from the purchase price in a sale during the local tax year, but each party is considered as owing a part of the tax proportionate to his period of ownership. In stating the final account of sale, a sum representing the apportionment may for convenience appear as a debt or credit upon the purchase price, but it is not a part thereof and is not so considered. Furthermore, the Commissioner's theory does violence to the purpose of the income tax statutes that items of income shall be accounted for in annual periods.* Clearly this purpose will not be served if the constantly recurring burden of the tax is refused recognition as an item of current expenses and is placed in the category of a capital expense to be reckoned with under the income tax statutes only in the event of sale at some future date." (Emphasis added.)

The Court there sustained the deduction.

Tenth. We now come to the opinion of the District Court in the case at bar. After stating the principal facts, the Court said:

> "However it is argued for the defendant Collector that, as taxes have been specifically provided for in the statute, the question of their deductibility under the facts of this case must be justified if at all by the particular phraseology of the statute with respect to tax deductions. *The language of this is exceedingly clear and simple. It permits the taxpayer to deduct 'taxes paid or accrued within the taxable year'. * * *. It is also perfectly clear that the taxpayers in this case bring themselves precisely within the literal language of the statute in that they did pay the taxes within the taxable year.* It is however, the contention of the defendant Collector that the phrase 'taxes paid' must be construed as if it read 'taxes paid if assessed on the tax roll to the taxpayer'; and that as so construed the taxpayers in this case are not entitled to the deduction, even though they ask only for the deduction of that portion of the taxes for the whole year which accrued during their ownership of the property and which of course they had to pay to continue in enjoyment of the property. * * *.
>
> "Before beginning the discussion of the point of law thus raised, it is desirable to first refer to the legal incidents of the Maryland taxing system and the customary handling of real estate transactions in Baltimore City. I am referring to these not as necessarily controlling the determination of the particular question, but as a factor to be considered in connection with the defendant's construction of the federal statute. In Maryland taxes on real estate (but not on personal property) become a lien upon the property when due and so continue until paid; (Flack's 1939 Md. Code, Art. 81, Section 72); and are also apparently a personal liability of the owner in whose name the property is assessed on the tax rolls on the date of 'finality'. Md. Code, Art. 81, Sections 2 (20) and 154; Bassett v. Ocean City, 118 Md. 114, 119, 84 A. 262; Free v. Green, 175

Md. 36, 41, 199 A. 857, 117 A. L. R. 717; Mayor and City Council of Baltimore v. Perrin April 4, 1940, 178 Md. 101, 12 A (2d) 261. The taxes with which we are here dealing are those imposed on real estate by the State of Maryland and also those separately imposed under the statutes by Baltimore City. Both classes of taxes become due and payable on January 1st of each year for that current year, although the City taxes are not in default for non-payment until July 1st (after which time if not paid interest and penalties at a prescribed rate accrue thereon), and the State taxes become in default if not paid by January 1st of the succeeding year (Md. Code, Art. 81, Section 74). It is also to be noted that in Baltimore City the date of 'finality' with respect to City taxes is October 1st of the year prior to the taxable year. The person who owns the property on October 1st and is assessed for it on the assessment rolls thereby becomes liable for the taxes for the succeeding calendar year, even though he may sell and dispose of the property between October 1st and January 1st, when the taxes first become actually payable. In re Wells, D. C. Md., 4 F. Supp. 329. It is also to be noted, as appears from the uncontradicted testimony in this case (R. 13-15), that it is the almost universal custom in Baltimore City, and has been for many years, that as between seller and buyer of real estate, taxes are adjusted to the date of settlement and transfer of the property. That is to say, if the settlement date is July 1st the seller is charged with one-half of the tax bill for the whole calendar year and the buyer with the other half, and so proportionately with respect to settlement at any other date during the calendar year. If the taxes have not been paid by the seller prior to the settlement date the purchaser assumes the whole tax bill and is credited with that proportion of the year's taxes which has accrued up to the date of settlement. If the seller has already paid the taxes for the year he is credited with that portion of the taxes allocated to the purchaser. It also appears from the testimony in this case of two experienced

certified public accountants (R. 14-15) that for many years past, in preparing income tax returns for their clients, they have habitually deducted taxes as adjusted between seller and buyer as was done in this particular case by the taxpayer."

The Court then distinguished the cases cited by the defendant (petitioner), stating as follows:

"But it will be found on examination that these cases (with one exception noted) have not dealt with the deduction of taxes adjusted for a current tax year, which is the problem here presented. It is clear enough that unpaid taxes for a prior year, which are properly a charge against income for that year, wholly preceding the new ownership, must be treated as a part of the cost, and (as is almost universally the case in Baltimore City) are credited to the purchaser on the settlement sheet at the time of the transfer of the property. We are dealing here only with taxes for a current year as allocated to the seller in proportion to the period of the year for which he has the ownership. In a similar case the adjusted taxes were allowed to the purchaser as a deduction for the current year in John Hancock Mutual Life Ins. Co. v. Com'r., 10 B. T. A. 736; and see Helvering v. Missouri State Life Ins. Co., 8 Cir., 78 F. 2d 778, 781; and Com'r. v. Coward, 3 Cir., 110 F. 2d 725."

The District Court then referred at length to the recent decision in the case of Commissioner v. Rust's Estate, et al., supra, and continued as follows:

"As pointed out in the Rust case, taxes are an annually recurrent burden on real estate, whether a lien or not. In this respect they are not different from ground rents, water rents and other fixed charges on property. To the extent that they are current they are properly chargeable to maintenance and not to capital by proper accounting practice. They are necessarily a charge against income and not an addition to capital.

On the other hand, unpaid taxes for prior years are not properly chargeable to current income for a subsequent year, and, on a change of ownership of property, necessarily constitute a part of the cost of the property. The statutory provision for the deduction of taxes should be applied in the light of the subject matter. The federal income tax is a tax on *net* and not on *gross* income; and the accounting with the government is put on an annual basis. The general purpose of the income tax is to find and tax the true net income as defined in the statute. This is accomplished only when current taxes and similar items are deducted from the current income. When an income taxpayer purchases investment property he is chargeable only with the income subsequently accruing from the property, and current charges against it are properly deductible to ascertain the net income. If the current income is adjusted to the date of transfer, similarly the current charges against the income shrould be likewise adjusted.

"The federal income tax statute allows deductions for taxes paid or accrued during the taxable year. The wording is plain and simple and, in the context of the whole statute, seems to clearly mean that the current tax burden on property, is to be deducted from current income from the property. In specifically mentioning taxes, in addition to current expenses, Congress probably had in mind the fact that expenses generally are deductible only with respect to a business, while taxes may also be deducted if paid on property owned for personal needs or pleasure, as in case of a dwelling. It is true, as provided in the applicable Treasury regulation (T. R. 94, Art. 34 (C)-1) that in general taxes are deductible only by the person upon whom they are imposed, and this is normally the case. Obviously a gratuitous payment of some other person's taxes would not be deductible by an income taxpayer. *But if the relationship of the taxpayer to the property is such that he must, as a practical matter, pay the tax*

to continue in the enjoyment of the income or use of the property, the statute is gratified because the payment is a necessary charge against the income if any from the property.

"The statute does not condition the deductibility of the taxes paid on the ownership of the property at the time of the assessment for local taxes, or on the particularities of the varying statutory schemes in the several States; and to cut down the taxpayer's right to the deduction by reason of the technical requirements of local taxation seems to contravene the plain words of the federal statute. It also introduces an unnecessary and undesirable lack of uniformity in the administration of the federal statute in the several States. Nor does it necessarily benefit the federal revenue, because, if the purchaser of property must capitalize the current taxes, his profit is less, or less greater, when he resells, and his taxable income is thus diminished.

"It is said for the defendant that in this case the taxpayers have paid the seller's taxes. But this is not so in reality. True the seller remained primarily liable to the local government, but *with respect to the property itself, the purchaser had the direct liability to pay the taxes to save it from tax sale; and legally the purchaser was directly liable to the seller to pay the taxes for the current year which he had assumed in the adjustment.* We must bear in mind that we are applying the federal statute, and the accounting is between the taxpayers and the federal government with respect to what is the net income of the taxpayers. The details of the local tax statutes do not control the matter except insofar as they necessarily affect the determination of the net income. *That the property was subject to a lien for taxes shows that the purchaser who had assumed the taxes was really the person obliged to pay them to avoid the loss of the property, and in paying them he discharged his own obligation, rather than that of another. In accounting*

with the federal government, it is immaterial that, with respect to the local taxing authority, the seller was primarily liable, and the purchaser liable over to the seller. The ultimate legal liability for the taxes was clearly on the purchasers in this case; and as they necessa y sustained the burden of the tax payments, there is no reason to deny them the deduction in their income tax accounting with the federal government. It thus becomes clear that the mere fact that the seller was the owner of the property at the time the local tax assessment was made, and therefore the debtor to the local government, as the named owner on the tax rolls, is legally immaterial in the federal tax problem." (Emphasis added.)

We submit that the reasoning of the District Court is sound in every respect, and we refrain from repeating the arguments therein contained.

RECAPITULATION OF DECISIONS ADVERSE TO TAXPAYER.

In Falk Corporation v. Commissioner, supra, the deduction claimed (payment of state income taxes) was clearly a part of the purchase price because made so by express agreement between the buyer and seller.

In Helvering v. Missouri State Life Ins. Co., supra, section 23 (c), here sought to be construed was not involved; and the opinion does not show whether, assuming a day to day accrual, any part of the real estate taxes claimed as deductions were for periods of time the income taxpayer actually owned the land.

In Merchants Bank Bldg. v. Helvering, supra, the taxes in question were for a year which was fully expired before the transfer of the property took place.

In Walsh-McGuire Co. v. Commissioner, supra, the decision was not based on the words "taxes paid," in Section

23 (c), as in the case at bar, but on the words "taxes accrued", as used therein.

In Lifson v. Commissioner, supra, there was no adjustment of taxes to the date of sale as in the case at bar, and the purchaser, in effect, expressly agreed to pay the accrued tax.

These cases, we think, are not only largely distinguishable from the case at bar but, as was said in Commissioner v. Coward, supra, are "completely beside the point", and the argument adopted therein, "founded on precedent rather than principle". The later cases (Commissioner v. Coward, supra, and Commissioner v. Rust, supra), show a tendency to veer away from them.

ANSWER TO PRESENT QUESTION NOT DEPENDENT ON STATE STATUTES.

Unless we remove from the money paid to the City and State in the case at bar all semblance of "taxes", the deductions should have been allowed as claimed, and consequently the respondents properly recovered in this action.

Section 23 of the Revenue Act of 1936 provides:

> "In computing net income there shall be allowed as deductions:
>
> (a) * * *
>
> (b) * * *
>
> (c) *Taxes paid or accrued within the taxable year*", (with numerous exceptions, not here material).

To disallow the deductions claimed in this case the Court must read into the statute a further exception in substantially these words:

> "Provided, however, that the word 'taxes', as herein used under (c) shall not include money paid in the

> discharge of State and City taxes on real estate by a purchaser who became such after such taxes have become liens thereon.",

or, as the District Court, in its opinion, put it,

> " 'taxes paid' must be construed as if it read 'taxes paid *if assessed on the tax rolls to the taxpayer.*' "

And this amendment must be read into the statute even though, because of the well known variance of state statutes, the citizens of some states would thus bear a heavier burden of Federal income taxes than those of other states. This is in the teeth of the opinion in Thomas v. Perkins, 301 U. S. 655-9, where this Court (p. 659) said:

> "The Federal Income Tax Act is to be given a uniform construction of nation-wide application except insofar as Congress has made it dependent on state law."

And where has Congress said that deductions under Sec. 23 (c) should depend on State law? Again, in Burnet v. Harmel, 287 U. S. 103, at p. 110, this Court said:

> "State law may control only when the federal taxing act, by express language or necessary implication makes its operation dependent upon state law."

Can it be presumed that the intent of Congress was that deductions under the words "taxes paid" in Section 23 (c) should mean only, and be limited to, levies for which there existed no lien at a certain time, or for which the taxpayer was not personally liable; that the citizens of one state should be allowed deductions for monies they paid the State and City governments as taxes, and those of other states should not, dependent entirely on what the state statutes provided relative to liens for taxes and the personal liability of the owners of property for taxes thereon?

Is a tax any the less a tax, whether or not the State or City has a lien for its collection, or whether the owner of property is personally liable therefor?

In short, the question is: When is a tax not a tax within the meaning of Section 23 (c)?

The answer to these questions is obvious; Congress intended the words "taxes paid" to mean monies paid for the support of the government, without regard to state statutes relative to liens or personal liability for property taxes.

In construing this statute, we submit, we must begin with the rule that the word "taxes" as used in Section 23 (c) should be given its ordinary and commonly understood meaning and not one with a hidden condition attached.

> Miller v. Robertson, 266 U. S. 243, 250;
> 59 C. J., p. 975, and cases cited.

In Old Colony R. Co. v. Commissioner, 284 U. S. 552, at p. 560, this Court said:

> "The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' Levy's Lessee v. McCartee, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' Maillard v. Lawrence, 16 How. 251, 261. And see United States v. Buffalo Gas Co., 172 U. S. 339, 341; United States v. First Nat. Bank, 234 U. S. 245, 258; Caminetti v. United States, 242 U. S. 470, 485. As was said in Lynch v. Alworth-Stephens Co., 267 U. S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts: De Ganay v. Lederer, 250 U. S. 376, 381."

The Board of Tax Appeals also has recognized and applied to subsection (b) of the same statute, the above broad construction rule in favor of the taxpayer.

In Fackler v. Commissioner, 39 B. T. A. 395, the Board construed section 23 (b) of the Revenue Act of 1934 (later carried over identically into the 1936 Act which we are now considering) which provided for the deduction from gross income of

> "all interest paid or accrued within the taxable year on indebtedness except" (exceptions not there material).

The taxpayer had prepaid interest on borrowed money beyond the year covered by his tax return and had claimed a deduction for the full amount so prepaid, which deduction was disallowed by the Commissioner because of such prepayment. The Board (p. 398), in part, said:

> "Since the contrary does not appear in the statute, the term, 'interest' must be construed according to its ordinary meaning. Old Colony Railroad Co. v. Commissioner, 284 U. S. 552.
>
> * * * Here, whatever other designation, by analogy may be applied to the disputed items—they are 'interest' payments and are thus deductible within these specific provisions of the statute. That they may not[1] have been ordinary or necessary expenses of business of the taxpayer is not a requisite to their deduction under the statute."

In The Northwestern Mutual Life Insurance Co. v. Johnson, State Treasurer, etc., 8 Cal. 2d 42, by Section 14 of Article XIII, of the Constitution of California, insurance companies were required to pay a tax measured by a percentage of the gross premiums received from business done in that State. That section also provided that there should

[1] The word "not" evidently is included by error.

be deducted from the amount of such tax the amount of taxes "paid by such companies on real estate owned by them in this State." The State treasurer contended that this created an exemption as to the real estate taxes rather than an allowable deduction and that hence the provision must be strictly construed against the taxpayer, and that (as an exemption) to be entitled to the claimed deduction the taxpayer must have owned the property on the date the tax became a lien.

The Court, however, held that the amount of State taxes paid on real estate was a deduction and not an exemption from tax, and in part, said:

> "In the absence of language (and there is none) in the constitutional section which would expressly impose the requirement of ownership of the property at the time the taxes on real estate become a lien before the deduction could be claimed, we have no hesitancy in declaring that the time when the offset is to be effective is the time of payment of the current real estate tax.
>
> * * *
>
> "We conclude that there is nothing in the Constitution which would prevent the offset of current real estate taxes paid by the insurance company on property owned by it at the time of payment thereof, although in another's ownership at the time the tax became a lien, and that the reason and purpose of the law as now framed permits and requires such deduction.
>
> "The evidence of any departmental construction, assuming its pertinence, contrary to the conclusion stated is insufficient to justify a different conclusion."

In the case at bar, at the time the real estate taxes were paid for which deductions are sought, the respondents were the actual owners of the property as in the above case.

Although the money paid the City and State by the purchaser is, in a restricted sense, a part of the purchase price, it is still, nevertheless, "taxes" in the *ordinary sense*, and *that is the sense in which it was clearly used by Congress*. Imagine the purchasers in the present case, upon acquiring title, e. g., on July 1st, 1940, going to the City Hall, presenting the tax bills for 1940 theretofore issued to the vendor with reference to the properties purchased, and announcing they wished to pay off the balance of the purchase price of their properties!

The word "tax", in its ordinary sense, means:

> "A pecuinary burden laid on individuals or property for the purpose of supporting the Government." State of New Jersey v. Anderson, 203 U. S. 483.

And, in ascertaining the meaning of Section 23 (c), we must apply the rule that the intent and meaning of a statute should be determined from the statute itself.

> Child Labor Tax Case, 259 U. S. 20;
> Lake County v. Rollins, 130 U. S. 662;
> United States v. Wiltberger, 5 Wheat. 76;
> Barnes v. The Railroads, 17 Wall. 294;
> Boston and M. R. Co. v. United States, 265 F. 578 (C. C. A. 1);
> United States v. Thompson, 189 F. 838;
> 59 C. J., pp 952-3 and cases cited.

As was said by Chief Justice Marshall, in United States v. Wiltberger, supra:

> "The intention of the legislature is to be collected from the words they employ."

In United States v. Mo. Pac. R. Co., 278 U. S., 269, p. 277, the Court said:

> "The language of that provision is so clear and its meaning so plain no difficulty attends its construction

in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. * * * Construction may not be substituted for legislation. United States v. Wiltberger, 5 Wheat, 76, 95-96; United States v. Fisher, 2 Cranch, 358, 386; Lake County v. Rollins, 130 U. S. 662, 670; Caminetti v. United States, 242 U. S. 470; Ex Parte Public National Bank (278 U. S., p. 101); United States v. Colorado & N. W. R. Co., 157 F. 321, 327. * * *

* * * But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."

And no policy of the government can change the clear wording of the statute. St. Paul M. & M. R. Co. v. Phelps, 137 U. S. 528.

In Shreeve v. Cheesman, et al. (C. C. A. 8) 69 F. 785, there was a controversy over the matter of court costs recoverable by the successful party. A state statute provided that the defeated party in an action to recover land might, at any time before the first day of the term succeeding that at which judgment is rendered against him, pay all costs recovered by such judgment and thereupon have a new trial of the case. Another statute provided that a successful plaintiff should recover against the defendant his costs to be taxed. The plaintiff, in error, attempted to have the words "costs to be taxed" construed to mean only costs of the last trial.

The Court, in part, said:

> "Moreover, the statute of Colorado needs no interpretation. Its language is simple and plain. 'His costs to be taxed' cannot mean anything less than all his costs in the action to be taxed. The moment an attempt is made to limit these words to a part of his costs, we are met by the unanswerable question: What part? That which was clear and certain becomes a matter of doubt and conjecture. When the meaning of a statute is plain, arguments drawn from the history of the legislation it embodies and the construction given to ambiguous statutes on the same or similar subject serve only to create doubt where none should exist, and to confuse the judgment when it would otherwise be sound and clear. There is no better canon of interpretation than that when a statute is plain and unambiguous, the legislature must be presumed to have intended what it expressed, and no room is left for construction. Knox Co. v. Morton, 68 F. 787; U. S. v. Fisher, 2 Cranch 358, 399; Railway Co. v. Phelps, 137 U. S. 528, 536, 11 Sup. Ct. 168. * * * The statute does not except these costs from the general provision, and it would be judicial legislation for the court to create exceptions to the general provisions of this law when the legislature has made none. Where the legislature has made no exception to the positive terms of a general statute, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so. Madden v. Lancaster Co., 12 C. C. A. 566, 573, 63 F. 188; Morgan v. City of Des Moines, 8 C. C. A. 569, 60 F. 208; McIver v. Rogan, 2 Wheat. 25, 29; Bank v. Dalton, 9 How. 522, 528; Vance v. Vance, 108 U. S. 514, 521, 2 Sup. Ct. 854."

Now, we would inquire of the petitioner, where is there any ambiguity in the words of Section 23 (c)? We submit no words could be plainer or more easily understood. In United States v. Woodward, 256 U. S. 632, this Court construed these same words ("taxes, paid or accrued within the taxable year") and said:

"* * * Section 214 makes express provision for the deduction of 'taxes paid or accrued within the taxable year, imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes'. This last provision is the important one here. *It is not ambiguous but explicit, and leaves little room for construction. The words of its major clause are comprehensive and include every tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be excepted. The implication from the latter is that the taxes which it enumerates would be within the major clause were they not expressly excepted, and also that there was no purpose to except any others.* Estate taxes were as well known at the time the provision was framed as the ones particularly excepted. Indeed, the same act, by Sections 400-410, expressly provides for their continued imposition and enforcement. Thus, their omission from the excepting clause means that Congress did not intend to except them."

In view of the above cases it is difficult to see how the courts could be justified in construing the statute here involved as if it contained the exception contended for by the petitioner. The mere fact that the taxpayer retained a right which he may not have been allowed to keep if Congress had had the present question called to its attention before passing the legislation is no excuse for enlarging the law as enacted, by judicial interpretation. As was said in Iselin v. United States, 270 U. S. 245:

"The Statute was evidently drawn with care. Its language is plain and unambiguous. *What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.* To supply omissions transcends the judicial function. Compare United States

v. Weitzel, 246 U. S. 533, 543; Peoria & Pekin Union Ry. Co. v. United States, 263 U. S. 528, 543, 535."

See also:

Brown v. Maryland, 12 Wheat. 419, 438;
Bend v. Hoyt, 13 Pet. 263, 10 L. ed. 154;
Arnold v. United States, 147 U. S. 494, 37 L. ed. 253.

The law favors the taxpayer, generally, and all doubts as to the construction of revenue statutes must be resolved in his favor and against the taxing power.

United States v. Merriam, 263 U. S. 179;
Gould v. Gould, 245 U. S. 151;
Bowers v. Lighterage Co., 273 U. S. 346;
United States v. Updike, 281 U. S. 489;
Burnet v. Niagara Falls Brewing Co., 282 U. S. 648;
Old Colony R. Co. v. Commissioner, 284 U. S. 552.

With relation to Internal Revenue statutes, it is stated in 59 C. J., at pp. 1131-2, as follows:

> "As a general rule revenue laws, such as laws imposing taxes and licenses are neither remedial laws nor laws founded upon any permanent public policy; but, on the contrary, operate to impose burdens upon the public, or to restrict them in the enjoyment of their property in the pursuit of their occupations, and when they are ambiguous or doubtful, will be construed strictly in favor of the taxpayer and against the taxing power." (Citing Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, and numerous other cases.)

Applying these rules to Section 23 (c) we submit that there is no doubt that Congress intended to allow deductions for *all*,

"Taxes paid or accrued within the taxable year",

with only the exceptions mentioned by the Act itself.

We urge also that Congress, by making specific exceptions to the deductibility of "taxes paid or accrued", in Section 23 (c), thereby brings into play in favor of the respondents, the maxim *expressio unius est exclusio alterius.*

Bank of Alabama v. Dalton, 9 How. 522, 13 L. ed. 242;
United States v. Arredondo, 6 Pet. 725;
Sturges v. Collector, 12 Wall. 19;
Arthur v. Cumming, 91 U. S. 362;
United States v. County Court, 99 U. S. 582;
Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

CONCLUSION.

The judgment of the court below should be affirmed.

Respectfully submitted,

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April, 1942.

SUPREME COURT OF THE UNITED STATES.

No. 947.—October Term, 1941.

M. Hampton Magruder, Collector of Internal Revenue for the District of Maryland, Petitioner, *vs.* Frederick M. Supplee and Elizabeth G. Supplee, His Wife.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 25, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

During the years 1936 and 1937 respondents purchased various parcels of real estate in Baltimore, Maryland. In each instance the state and city taxes on the real estate for the current year had not been paid at the time of purchase. The various contracts provided for the apportionment of these current real estate taxes, respondents agreeing to pay the amount of the taxes, and the vendors undertaking to bear the burden of that portion of the taxes arithmetically allocable to the fraction of the year that had expired prior to the date of purchase. Adjustments were accordingly made in the purchase prices to reflect this arrangement.

Respondents paid the local authorities the full amounts necessary to discharge the tax liability. In their 1936 and 1937 income tax returns, which were on the cash basis, they deducted that portion of those taxes "allocable" to the periods after purchase. The Commissioner of Internal Revenue ruled that the amounts in question were not deductible under Section 23(c) of the Revenue Act of 1936, 49 Stat. 1648, 1659,[1] but instead were merely part of the cost of the properties. Accordingly, he made a deficiency assessment which was paid under protest. This suit for refund followed. The District Court held the amounts were deductible,[2] and the Circuit Court of Appeals affirmed[3] on the authority of its

[1] Sec. 23. Deductions from Gross Income.
In computing net income there shall be allowed as deductions:

(c) *Taxes Generally.*—Taxes paid or accrued within the taxable year, . . .

[2] 36 F. Supp. 722.

[3] 123 F. 2d 399.

previous decision in *Commissioner* v. *Rust's Estate*, 116 F. 2d 636. We granted certiorari because of an asserted conflict with *Lifson* v. *Commissioner*, 98 F. 2d 508.

The question for decision is whether the amounts apportioned by respondents on the basis of the fractions of the taxable years remaining after the several purchases constitute "taxes paid within the taxable year" within the meaning of Section 23(c) of the Revenue Act of 1936, 49 Stat. 1648, 1659, and hence are deductible.

The guiding principle for determining whether a payment satisfying a tax liability is a "tax paid" within the meaning of Section 23(c) is furnished by the applicable Treasury regulation, which states that "In general taxes are deductible only by the person upon whom they are imposed".[4] See *Colston* v. *Burnet*, 59 F. 2d 867; *Small* v. *Commissioner*, 27 B. T. A. 1219; Paul, Selected Studies in Federal Taxation, Second Series, p. 24. Resort must be had here to the laws of Maryland and of the City of Baltimore to determine upon whom the state and city real estate taxes were imposed. *Walsh-McGuire Co.* v. *Commissioner*, 97 F. 2d 983, 984; cf. *Helvering* v. *Fuller*, 310 U. S. 69, 74-75; and see Paul, *op. cit. supra*, pp. 23-24.

To illustrate concretely the workings of the Maryland tax system with respect to respondents' purchases the property bought on May 10, 1936, may be taken as typical of all the other transactions. The assessment date, or "date of finality", for both state and city taxes was October 1, 1935.[5] These taxes were for the calendar year 1936[6] and became due and payable on January 1, 1936,[7] although the default date for city taxes was not until

[4] Article 23(c)-1 of Treasury Regulations 94, promulgated under the Revenue Act of 1936. This is a regulation of long standing. See Treasury Regulations 86, promulgated under the Revenue Act of 1934, Article 23(c)-1; Treasury Regulations 77, promulgated under the Revenue Act of 1932, Article 151; Treasury Regulations 74, promulgated under the Revenue Act of 1928, Article 151; Treasury Regulations 69, promulgated under the Revenue Act of 1926, Article 131; Treasury Regulations 65, promulgated under the Revenue Act of 1924, Article 131.

[5] Ann. Code of Maryland (Flack, 1939), Vol. 2, Art. 81, Sec. 26(b), provides that state and local taxes shall have the same date of finality as is provided by local law, and the date of finality for Baltimore with respect to any tax year is October 1 of the preceding year. See Code, Public Local Laws of Maryland (Flack, 1930), Art. 4, Sec. 40.

[6] Taxes are imposed annually on a calendar year basis. See Ann. Code of Maryland (Flack, 1939), Vol. 2, Art. 81, Sec. 26(a) and (b); Code, Public Local Laws of Maryland (Flack, 1930), Art. 4, Sec. 40.

[7] See Ann. Code of Maryland (Flack, 1939), Vol. 2, Art. 81, Sec. 46(b), which provides that state taxes are payable on January 1. Sec. 46(a) pro-

July 1, 1936, and for state taxes January 1, 1937.[8] Both the state and the city had liens against the property from the due date, January 1, 1936.[9] And, respondents' vendor became personally liable for these taxes before the sale. An action of assumpsit could have been brought against him for the taxes at any time after the due date.[10] Had he sold the property between October 1, 1935 and January 1, 1936, he apparently would still have remained personally liable, and if he had gone into bankruptcy after such sale the taxing authorities would have had a provable claim against him. *In re Wells*, 4 F. Supp. 329; cf. *Baltimore* v. *Perrin*, 178 Md. 101, 107.

It is thus apparent that tax liens had attached against the properties and that respondents' predecessors in title had become personally liable for the taxes prior to any of the purchases. The attachment of a lien for taxes against property before its sale has been held to prohibit the vendee from deducting as "taxes paid", amounts paid by him to discharge this liability. *Lifson* v. *Commissioner*, 98 F. 2d 508; *Walsh-McGuire Co.* v. *Commissioner*, 97 F. 2d 983; *Merchants Bank Building Co.* v. *Helvering*, 84 F. 2d 478; *Helvering* v. *Missouri State Life Insurance Co.*, 78 F. 2d 781. A tax lien is an encumbrance upon the land, and payment, subsequent to purchase, to discharge a pre-existing lien is no more the payment of a tax in any proper sense of the word than is a payment to discharge any other encumbrance, for instance a mortgage. It is true that respondents here could not have retained the properties unless the taxes were paid, but it is also true that they could not retain them without paying the purchase price. It is no answer therefore to say that the property was burdened with the taxes and that respondents became obligated to pay them. There was a burden, but it was contractually assumed. In discharging this assumed obligation respondents were not paying taxes imposed upon them within the meaning of Section 23(c). For "only the person owning the property at that time [i.e., when the tax lien at-

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vides that local taxes shall be payable in accordance with local law, and under local law Baltimore taxes are due on January 1. Code, Public Local Laws of Maryland (Flack, 1920), Art. 4, Sec. 40.

[8] Code, Public Local Laws of Maryland (Flack, 1930), No. 4, Sec. 40; Ann. Code of Maryland (Flack, 1939), Vol. 2, Art. 81, Sec. 74.

[9] Ann. Code of Maryland (Flack, 1939), Vol. 2, Art. 81, Sec. 72.

[10] Ann. Code of Maryland (Flack, 1939), Vol. 2, Art. 81, Sec. 154. See County Commissioners of Frederick County v. Clagett, 31 Md. 210; Bassett v. M. & C. C. of Ocean City, 118 Md. 114, 119; Free v. Greene, 175 Md. 36, 41.

taches] is subjected to the burden which the law imposes; and only the person who has been thus subjected to the burden of the tax is entitled to a deduction for paying it. Payment by a subsequent purchaser is not the discharge of a burden which the law has placed upon him, but is actually as well as theoretically a payment of purchase price; for, after the lien attaches and the taxing authority becomes pro tanto an owner of an interest in the property, payment of the tax by a purchaser is nothing but a part of the payment for unencumbered title." Judge Parker, dissenting in *Commissioner* v. *Rust's Estate*, 116 F. 2d 636, 641.

Furthermore, respondents paid taxes for which their vendors were personally liable. This was clearly the payment of a tax imposed upon another and therefore not deductible by respondents. Cf. *Walsh-McGuire Co.* v. *Commissioner*, 97 F. 2d 983; *Gatens Investment Co.* v. *Commissioner*, 36 B. T. A. 309; *Kohlsaat* v. *Commissioner*, 40 B. T. A. 528. And see *Commissioner* v. *Coward*, 110 F. 2d 726, 727.

Thus either a pre-existing tax lien or personal liability for the taxes on the part of a vendor is sufficient to foreclose a subsequent purchaser, who pays the amount necessary to discharge the tax liability, from deducting such payment as a "tax paid". Where both lien and personal liability coincide, as here, there can be no other conclusion than that the taxes were imposed on the vendors. Respondents simply paid their vendors' taxes; they cannot deduct the amounts, or any portion thereof, paid to discharge liabilities so firmly fixed against their predecessors in title by the laws of Maryland.

The view of the court below that the parties' contractual arrangement for apportionment of the tax burden was controlling is untenable.[11] Parties cannot change the incidence of local taxes by their agreement. And it is misleading to speak of real estate taxes as "applicable" to the fractional part of a tax period following purchase. Such taxes are simply one form of raising revenue for the support of government. They are not like rent, nor are they paid for the privilege of occupying property for any given period of time.

The judgment below is

Reversed.

[11] The opinion below was a per curiam affirmance on the authority of Commissioner v. Rust's Estate, 116 F. 2d 636. The Court there relied on the fact that the parties had agreed to apportion the tax obligation. p. 640.